National Indian Business Association

725 Second Street, N.E., Washington, D.C. 20002

March 4,2002

Colonel Barry Wilson, Director
Defense Acquisition Regulations Council
Crystal Square 4, STE 200A
1745 Jefferson Davis Highway
Arlington, VA 22202-3402

FedEx #829280622288

Re: Public Comments [DFARS Case 2000-D024]

Dear Colonel Wilson:

Based on the recent public comments submitted to the DAR Council from numerous Tribal Governments, including the Navajo Nation, the Chickasaw Nation, the Pueblo of Sandia, the Santa Clara Indian Pueblo, the Citizen Potawatomi Nation, the Fort Sill Apache Tribe, the Sitnasuak Alaskan Native Village Corporation, and the National Congress of American Indians, which represents over 250 Indian Tribes, the National Indian Business Association (NIBA) wishes to strongly object to the DAR Council's decision to bar the use of Congress's Indian Incentive Program in all contracts subject to Part 12 Commercial supply procedures. We believe that this decision violates the Equal Protection Clause of the United States ***Constitution,*** as defined by the United States Supreme Court. Because NIBA had initially commented with respect to DFARS Case 2000-D024, we hereby amend our initial public comments submitted to the DAR Council with the comments submitted within this document.

Before detailing our specific objections to this decision, we would like to offer a brief historical perspective of the state of the Indian Nations for your consideration. Few people realize how United States policies subjugated and repressed tribal economies well into the 1970's, and continue to create significant and unnecessary burdens to this day. The enduring legacy of these many decades of devastation is that most Indian Nations are the poorest and least developed communities in the United States. It is a well established policy of Congress, that the United States has an obligation to help rebuild the shattered infrastructures of the Indian Nations and to create the opportunity for economic prosperity that will benefit not only Indian people, but the entire American economy. The United States Supreme Court has ruled that the United States owes a trust responsibility which has been defined by the Court as, "a moral obligation of the highest responsibility and trust,''to protect Indian Nations, their resources, and their rights." When issuing rules that affect the tribal rights of the Indian Nations, we believe that the DAR Council has the same obligation of all federal government agencies, which is to support and protect this established trust relationship as ordered by Congress and the United States Supreme Court.

As the DAR Council is aware, promulgating rules without Tribal Consultation is prohibited by the 1998 "Department of Defense American Indian Alaska Native Policy," and is a violation of numerous federal statutes, Executive Orders, and United States Supreme Court decisions, all of which are based on treaties between the federal government and the Indian Nations. **NIBA** does not believe that Congress, nor the President have authorized the DAR Council to reverse or dismiss any federal case law or statute, as these legal instruments relate to the treatment of Indians.

Based on federal law, it is important that the Department of Defense, and the DAR Council, recognize American Indian and Alaska Native statutory preferences in employment, Federal financial assistance arrangements, contracting, and sub-contracting. Under the Equal Protection Clause of the ***Constitution,*** the Supreme Court has ruled that as a political group, Indians are exempted from the restrictions of this Clause. Based on this exemption, the Supreme Court has ruled that Indians must be treated differently than all other citizens and ethnic groups in the United States. The Supreme Court has ruled that all Indian statutory preferences in employment, Indian Federal financial assistance arrangements, and Indian federal contracting programs, are Constitutional and are not a violation of the Equal Protection Clause. The federal government's preference for the acquisition of items supplied by Indian-owned economic enterprises is prevalent throughout federal law. For example, 25 USC 47, the "Buy Indian Act" specifically allows a preference for the acquisition of Indian supplied items, over items supplied by any other company or minority group. Any claim by the Department of Defense that Indian's must not be treated differently than any other minority group, violates the Equal Protection decision ordered by the United States Supreme Court and would be inconsistent with "the Buy Indian Act," which requires the federal government to establish a preference for buying Indian supply items. In Cherokee Nation v. Georgia, the Court held that based on the ***Constitution,*** an Indian Tribe is a "distinct political society... capable of managing its own affairs and governing itself." While the DAR Council has chosen to view Native American's as a minority group, based on the numerous decisions by the United States Supreme Court with regard to Indian's, and their references in the ***Constitution,*** the DAR Council must treat Indian's **as** a political group and not as an ethnic minority group.

At this time, Congress has not granted the DAR Council the authority to dismiss or reverse 25 USC 1544, the Indian Incentive Program, by barring a majority of the items acquired by the Department of Defense from this Indian socioeconomic acquisition initiative. With respect to the Indian Incentive Program, based on 25 USC 1544, there is no legal requirement for the DAR Council to bar the use of commercial items from inclusion in the Indian Incentive Program. To date, there have been many Tribal Corporations and Indian-economic enterprises that have been irreparably harmed and damaged by the DAR Council's decision to inappropriately exclude commercial items from Congress's Indian Incentive Program. This rule created by the DAR Council, was implemented without public notice in violation of 5 USC **603** and in violation of Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency, 227 U.S. App. D.C. 201 (D.C. Cir. 1983), and without Tribal Consultation, in violation of the 1998 "Department of Defense Native American Alaska Native Policy" and Executive Order 12866 Section 1(b)9.

The decision by the DAR Council to bar the use of the Indian Incentive Program in all contracts subject to commercial procedures is unprecedented. No other federal preferential treatment program excludes minority owned businesses solely because the products supplied or manufactured by the minority owned company are commercial items. In fact, Indian-owned economic enterprises are the only small disadvantaged businesses subject to this highly irregular procurement rule implemented by the Department of Defense. The Department of Defense is the only federal agency that has barred the use of commercial items from Congress's Indian Incentive Program. The Civilian Agency Acquisition Council has not implemented any rule that excludes commercial items from this important Native American Congressional socioeconomic initiative. Furthermore, the Department of Defense included commercial items in the Indian Incentive Program for over twelve years. Not until recently did any collective DAR Council come to the conclusion that commercial items, must be barred from this Congressional program.

Recently, the Department of Defense implemented a small business incentive program that is very similar, in fact, almost identical to the Indian Incentive Program, that awards an incentive payment to all contractors that subcontract to small disadvantaged businesses and woman owned businesses. This Department of Defense program was implemented based on FAR 52.219-26(b), which reads as follows:

> **(b) If the Contractor exceeds its total monetary target for subcontracting to small disadvantaged business concerns in the authorized NAICS Industry Subsectors, it will receive _____ [Contracting Officer *to* insert the appropriate number between 0 and *10*] percent of the dollars in excess of the monetary target.**

Based on FAR 52.219-26, the "Small Disadvantaged Business Participation Program-Incentive Subcontracting,'' the DAR Council has promulgated DFARS 219.1203, which reads as follows:

> **The contracting officer shall encourage increased subcontracting opportunities for SDB concerns in negotiated acquisitions by providing monetary incentives in the North American Industry Classification System Industry Subsectors for which use of an evaluation factor or subfactor for participation of SDB concerns is currently authorized (see FAR 19.201(b)). Incentives for exceeding SDB subcontracting targets shall be paid only if an SDB subcontracting target was exceeded as a result of actual subcontract awards to SDBs, and not as a result of developmental assistance credit under the Pilot Mentor-Protege Program (see Subpart 219.71).**

Although the "Small Disadvantaged Business Participation Incentive Subcontracting Program" is virtually identical to the Indian Incentive Program, neither the DAR Council nor the Civilian Agency Acquisition Council have excluded commercial items from this important socioeconomic initiative by subjecting this program to the FAR Part 12 commercial item exclusion. It would seem legally required that if commercial items are allowed under FAR 52.219-26 and DFARS 219.1203, then commercial items must also be allowed under 25 USC 1544, FAR 52.226-1, and DFARS 52.226-104. Implementing two identical incentive programs, one for minority owned firms that include the use of commercial items, and one for Indian owned firms that does not include commercial items, is a clear violation of the Equal Protection Clause, as defined by the United States Supreme Court.

While Indian's have been exempted from the Equal Protection Clause in the respect that they may receive preferential treatment by the federal government above and beyond that of all United States citizens, Indian's have not been exempted from the Equal Protection Clause so that they may receive less than equal treatment from the federal government than that of the ethnic minority groups. Based on the Equal Protection Clause of the ***Constitution,*** either commercial items must be included in all Department of Defense preferential treatment programs, or commercial items must be excluded from all Department of Defense preferential treatment programs. For the DAR Council to apply one legal standard for Indian preferential treatment programs and a different legal standard for all other preferential treatment programs, is a violation of the Equal Protection Clause and not permitted by the United States Supreme Court.

Classified by the Supreme Court as a political group, versus being recognized as a minority group, it cannot be the position of the DAR Council that Indians should be treated less than equal to other ethnic minority groups, with respect to federal preferential treatment programs. The Supreme Court has already ruled that Indians should receive preferential treatment above and beyond all United States

citizens, therefore, it would be un-Constitutional and a violation of the Equal Protection Clause to treat Indian's less than equal to any ethnic minority group or citizen. Based on this important ruling, the Supreme Court and the Congress would be disturbed to learn that ethnic minority groups are receiving preferential treatment above and beyond that of Indians. Preferential treatment which exceeds that of Indian's, for any ethnic minority group, has not been approved by the Supreme Court. Additionally, because of their unique dual citizenship, even though as Indian's they have been exempted from the Equal Protection Clause so that they may receive preferential treatment by the federal government, as United States citizen's, Indian's have not been exempted from the protections of the Equal Protection Clause and cannot be treated less than equal to that of the ethnic minority groups.

Chief Justice John Marshall of the United States Supreme Court, who was instrumental in defining the Constitutional status of Indians, described the legal relationship between the federal government and the tribes as "unlike that of any other two people in existence." The federal government's unique obligation toward Indian tribes, defined by the Court as the "trust responsibility," is derived from their unique circumstances, namely that Indian tribes are separate sovereigns, but are subject to federal law. Since first recognized by Chief Justice Marshall in Cherokee Nation v. Georgia, the federal courts have held that Congress, as well as the Executive Branch, must carry out the federal government's fiduciary responsibilities to Indian tribes and their members. Of the Supreme Court's final rulings with respect to Indians and the Federal Government, this is a major point presented by Chief Justice Marshall. This fiduciary responsibility as required by the Cherokee decision, is very much applicable to the DAR Council and the way that it treats Indians, and the way that it promulgates rules affecting Indians.

Throughout our nations history, it has been well established that it is the federal government's responsibility for the welfare of the Indian tribes and their members. In the Cherokee decision, Chief Justice Marshall described the relationship between the federal government and the Indian tribes to "that of a ward to his guardian." This "trust relationship" is a term derived from treaties between the United States and Indian tribes involving massive land successions and the fact that the title to Indian lands is held for tribal members "in trust" by the federal government. It has also come to mean that, among its' other obligations, the protection of tribal members and the promotion of their economic and social well-being, is the responsibility of the federal government. In the opinion of NIBA, creating DFARS rules that are not based on law, solely to exclude a majority of the items purchased by the Department of Defense, from a law that was passed by Congress as the result of numerous treaty obligations and federal statutes, is a breach of this trust relationship and fiduciary responsibility.

Representing over 24,000 Native American and Alaskan Native owned businesses, NIBA requests the DAR Council to remove the Part 12 commercial supply restriction from all DFARS rules and we ask that the DAR Council immediately stop the practice of promulgating rules that affect Tribal rights and statutory rights, of the Indian Nations, without Tribal Consultation. We call upon the DAR Council to obey all Congressional Indian laws, as they are written, and to honorably defend and uphold the ***Constitution*** of the United States, including Congress's privilege and honor to "regulate Commerce with the Indian Tribes." The Constitutional implications of this decision by the DAR Council are profound and extremely serious. The support of the DAR Council to enforce these laws and to protect the Tribal rights of all Native American's, and to honor the United States Supreme Court's Indian Equal Protection Clause decision, would be appreciated.

Colonel Wilson, several of the largest Indian Tribes in our country, that have been communicating with us, have requested that we receive a final opinion from the Defense Acquisition Regulations Council and the Office of Small and Disadvantaged Business Utilization, by March 22,2002. We believe that you will agree, the Tribes have been extremely patient up until now, and have waited for

over a year to hear an answer from the DAR Council and the Office of Small and Disadvantaged Business Utilization. The Tribes would like to know whether or not the DAR Council will continue to bar all contracts subject to Part 12 procedures from the Indian Incentive Program, in spite of the numerous strong objections from the Indian Nations themselves. If it is the decision of the DAR Council to continue to bar these items, then the Tribal governments would like to know why Indian preferential treatment programs are treated differently than all other Department of Defense small disadvantaged business preferential treatment programs, and why the DAR Council believes that this decision would not be a violation of Indian Constitutional protections, as required by the Equal Protection Clause, as defined by the United States Supreme Court. Colonel Wilson, it is time to put an end to this unfortunate matter and to allow our organization to spread the word throughout Indian Country, that it is not the intention of the Department of Defense to bring harm to the Indian Nations. The time has come to offer the Indian Nations the courtesy, the respect, and the honor that they have fought for and deserve.

Respectfully yours,

Pete Homer, President
National Indian Business Association

Kari Fisher, Chickasaw Native
Chairman and CEO
Centrion Systems, Inc.

Andrew Akins, President
Red Arrow Ventures

cc: Mr. Frank Ramos, Director
Office of Small and Disadvantaged Business Utilization
1777 N. Kent St., Suite 9100
Arlington, VA 22209

Ms. Linda Oliver, Deputy Director
Office of Small and Disadvantaged Business Utilization
1777 N. Kent St., Suite 9100
Arlington, VA 22209

Ms. Angelina Moy, Case Worker
Defense Acquisition Regulations Council
OUSD(AT&L)DP(DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062